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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITY OF RICHMOND, Plaintiff and Appellant, v. RICHMOND POLICE OFFICERS' ASSOCIATION, Defendant and Appellant.	A121756 (Contra Costa County Super. Ct. No. MSN 08-0282)

This is an appeal from the trial court's decision to vacate an arbitration award that required the City of Richmond (the City) to reinstate Larry Darden as a police officer with the City's Police Department (the Department). Because we agree with the trial court that the arbitrator acted outside the scope of his authority in issuing the arbitration award, we affirm the decision to vacate the award.[1]

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 2006, Darden, a 20-year veteran Richmond police officer, was involved in an altercation with his girlfriend, Patcharaphorn Prachyawijit, and her 15-year-old son, Ted Assavarat, that resulted in the filing of domestic violence charges against Darden. According to Prachyawijit and Assavarat, during the altercation, Darden pinned Prachyawijit down, holding her arm behind her back, and then struggled with and

[1] We deny the City's unopposed motion to augment the record, as we have concluded the record, as originally filed, is sufficient to permit our resolution of the issues raised on appeal.

choked Assavarat when he tried to help her. According to Darden, he acted in self-defense after both Prachyawijit and Assavarat struck him. At some point during the altercation, Prachyawijit's younger son, Tim, called 911 and the Department responded, sending police officers to take statements from her and her sons and to photograph their injuries. The responding officer also ordered Darden to go to the police station to await further instructions. Once there, Darden was arrested for assaulting Prachyawijit and Assavarat, and was thereafter served with an emergency protective order requiring him to stay away from them and their residence.

On March 20, 2006, following a hearing on a petition filed by Prachyawijit, Judge Patricia Scanlon issued a civil restraining order against Darden (the March 2006 civil order). Pursuant to that order, which was set to expire March 20, 2009, Darden was prohibited from coming within 100 yards of Prachyawijit, Assavarat or their residence, and was further ordered not to "own, possess, have, buy or try to buy, receive or try to receive, or in any other way get a gun or firearm." In addition, the March 2006 civil order stated: "Defendant not to posses [*sic*] any weapons during his scope of employment." When Darden asked at the hearing whether the firearm ban could be stricken so that he could continue to carry a firearm during the course of his employment, Judge Scanlon advised him to hire an attorney and return to court to seek modification of the order.

Also on March 20, 2006, Lieutenant Arnold Threets of the Department advised Darden by letter that he could seek an exemption from the March 2006 civil order's firearm ban based on his employment as a police officer pursuant to Family Code section 6389. Darden, however, did not seek such an exemption, nor did he return to court to seek modification of the March 2006 civil order, as Judge Scanlon advised him to do.

Following a criminal investigation, Darden was charged with two misdemeanor counts of assault against Prachyawijit and Assavarat. In addition, following an internal affairs investigation, the Department issued a report sustaining all the allegations made against Darden by Prachyawijit and Assavarat, and concluding that he had engaged in conduct unbecoming to an officer and contrary to the Department's ethical rules.

On June 29, 2006, after having placed Darden on administrative leave, the City terminated Darden from employment as a police officer on two grounds: (1) his commission of assault against Prachyawijit and Assavarat in violation of Department rules, and (2) his inability to legally carry a firearm, pursuant to the March 2006 civil order, which disqualified him from serving as a police officer.

On July 7, 2006, appellant Richmond Police Officers' Association (RPOA), requested binding arbitration on behalf of Darden, of the City's decision to terminate him pursuant to the Memorandum of Understanding (MOU) that governed the parties' relationship.

On January 23, 2007, Darden pleaded no contest to one misdemeanor count of committing willful cruelty to a child (Pen. Code § 273a, subd. (b)). Pursuant to the plea agreement, the remaining charges against Darden were dismissed and he was sentenced to three years of probation. In addition, Judge John Laettner, who presided over the criminal proceedings, issued a protective order prohibiting Darden from having contact with Prachyawijit and her two sons (the January 2007 criminal order). In issuing that order, Judge Laettner advised Darden he would not be restricted from carrying a firearm.[2] Judge Laettner further advised Darden the "[t]he new restraining order supersedes prior restraining orders."

Pursuant to the MOU, proceedings before Arbitrator C. Allen Pool were held over a four-day period beginning June 28, 2007.

On November 13, 2007, Judge Laettner modified the January 2007 criminal order, striking the firearm relinquishment provision and stating: "Defendant is allowed to own and operate firearms. Firearm ban is deleted per Order on 1/23/07." The January 2007 criminal order, as modified, was set to expire on January 23, 2010.

On January 23, 2008, the arbitrator issued his opinion and award. Concluding that Darden had not assaulted Prachyawijit or Assavarat, the arbitrator directed the City to

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[2] Consistent with Judge Laettner's statement at the hearing, the section of the Judicial Council form order relating to relinquishment of firearms was not checked.

reinstate Darden to his prior position as police officer, and to pay him back pay with interest. In doing so, the arbitrator reasoned as follows:

"[Darden] was a 20-year veteran of the . . . Department with a good service record. . . . In return for those 20 years of service, he was entitled to due process and fair treatment. It was reasonable to assume that the City knew he would be appealing the order banning him from possessing a weapon. The City could have suspended him pending the outcome of his appeal. The City could have assigned him to a job in the department that involved no contact with the public until the matter was resolved. Other options were available. It had been done with other officers as evidenced by the testimony of [Lieutenant] Threet[s] (Tr. p. 95) and Chief Magnus (Tr. p. 208). [Darden] was deserving of the same consideration.[3]

"The City's argument that [Darden] is not qualified today was not supported by the evidence record. When the misdemeanor charges were dismissed by the Superior Court, the judge expressly revoked and lifted the prior ban on [Darden] possessing weapons. [Citation.] Therefore, the conclusion of the Arbitrator is that [Darden] is qualified to serve as a Richmond Police Officer."

On February 25, 2008, the City filed a petition in Contra Costa Superior Court to vacate the arbitration award. The City reasoned that the arbitrator had exceeded his authority by considering events occurring after Darden's termination when determining whether the City had just cause to terminate him, and by issuing an award that violated fundamental public policies requiring (1) obedience to valid court orders (to wit, the March 2006 civil order, which prohibited Darden from carrying a firearm), and (2) employers to protect the public from dangerous employees.

On April 10, 2008, following a hearing, the trial court granted the City's petition to vacate the arbitration award. In doing so, the trial court agreed with the City that the arbitrator had exceeded his authority by considering post-termination events in deciding whether the City had just cause to terminate Darden, and by issuing an award that

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[3] There is no transcription of the arbitration proceedings in the appellate record.

violated a public policy requiring obedience to valid court orders. The trial court disagreed, however, that the award violated a public policy requiring employers to protect the public from dangerous employees, reasoning that the City's argument assumed Darden was dangerous, "a finding not in accord with the arbitrator's findings and not open to appeal."

Both parties appeal from select portions of the trial court's decision.

DISCUSSION

On appeal, RPOA challenges on two grounds the trial court's decision to vacate the arbitration award. First, RPOA claims the trial court erred in concluding the arbitrator exceeded his authority by considering events occurring after Darden's termination – mainly, the issuance of the January 2007 criminal order, which permitted Darden to carry firearms – when determining whether the City had just cause to terminate him. Second, RPOA claims the trial court erred in concluding the arbitrator exceeded his authority by issuing an award that conflicted with a public policy requiring obedience to valid court orders. According to RPOA, when the arbitrator issued the award requiring the City to reinstate Darden, there was no enforceable court order prohibiting Darden from carrying firearms. As such, RPOA reasons, the trial court was wrong to order vacation of the award based on a supposed conflict with a valid court order.

The City, to the contrary, claims the trial court correctly concluded the arbitrator exceeded his authority by considering post-termination events and by issuing an award in violation of a public policy requiring obedience to valid court orders. The City reasons that the arbitration award would have required it to retain Darden as a police officer despite the March 2006 civil order, which prohibited him from carrying a firearm, an essential aspect of his law enforcement service. On cross-appeal, however, the City contends the trial court erred in finding that the January 2007 criminal order superseded and took precedence over the March 2006 civil order, reasoning that the latter order remained effective until its expiration date in March 2009 and that one trial court judge cannot overrule another such judge.

In resolving this dispute, we follow unusually strict rules of judicial review. The law favors arbitration as an efficient and less costly means to resolve disputes. (E.g., *Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362, 373 [*Advanced Micro Devices*].) Indeed, the long-standing policy in this state "in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. . . . 'Therefore every reasonable intendment will be indulged to give effect to such proceedings.' " (*Utah Const. Co. v. Western Pac. Ry. Co*. (1916) 174 Cal. 156, 159, overruled on other grounds in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 27-28 [*Moncharsh*].)

The California Supreme Court has more recently explained that "[i]n cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation] and ' "[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission." ' [Citation.]" (*Moncharsh v. Heily & Blasé, supra*, 3 Cal.4th at p. 8.) "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Id*. at p. 9.) "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." (*Id.* at p. 10.) "Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized." (*Ibid*.)

We also keep in mind that " '[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citations.] As early as 1852, th[e] [Supreme] [C]ourt recognized that, 'The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' (*Muldrow v. Norris* (1852) 2 Cal. 74, 77.)" (*Moncharsh, supra*, 3 Cal.4th at pp. 10-11.)

"Thus, both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, 'The merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. [Citations.]" (*Moncharsh, supra*, 3 Cal.4th at p. 11.) Indeed, with narrow exceptions, a court may not review an arbitrator's decision for errors of fact or law. (*Ibid.*) Rather, given the extremely limited scope of judicial review, an arbitrator's award may generally be vacated or corrected based only upon a finding of one or more of the grounds delineated by statute. (Code of Civ. Proc., §§ 1286.2, 1286.6.) Relevant here, "[t]hose statutory provisions permit a court to vacate or correct an award that exceeds the arbitrator's powers. (Code of Civ. Proc., § 1286.2, subd. (d), § 1286.6, subd. (b)." (*City of Palo Alto v. Service Employees Internat.* (1999) 77 Cal.App.4th 327, 334 [*City of Palo Alto*].)

On appeal from an order vacating an arbitration award, we review the trial court's decision de novo. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55.) To the extent, however, that the trial court's decision rests upon a determination of disputed factual issues, we review those issues for substantial evidence. (*Id*. at pp. 55-56; see also *Advanced Micro Devices, supra*, 9 Cal.4th at p. 376, fn. 9.)

With these important principles in mind, we turn to the issues at hand.

Did the Arbitrator Exceed his Authority by Considering Events Occurring After the City Terminated Darden?

RPOA first challenges the trial court's conclusion that the arbitrator exceeded his authority when issuing the arbitration decision and award by considering an event – to wit, the lifting of the firearms ban in the January 2007 criminal order – that occurred *after* the City made its decision to terminate Darden. The City, to the contrary, contends the trial court's conclusion was proper. In doing so, the City points out that the arbitrator himself, with the parties' agreement, framed the issue to be decided as: "Did the City

have just cause to terminate the Grievant, Lawrence Darden? If not, what shall be the remedy?" According to the City, this framing of the issue – using the verb "did" to limit the time frame to be considered by the arbitrator to events occurring only up through the date of Darden's termination – necessarily precluded the arbitrator from considering events occurring after his termination.

In making this argument, the City relies upon the United States Supreme Court decision in *Paperworkers v. Misco, Inc.* (1987) 484 U.S. 29, 39-40 (*Misco*). We thus turn to that decision.

In *Misco*, an arbitrator had found no just cause for an employee's termination and thus ordered his reinstatement. In reviewing that decision, the United States Supreme Court held that the arbitrator was entitled to refuse to consider evidence unknown to the employer at the time the employee was terminated because the arbitrator's procedural decision was consistent with the terms of the parties' collective bargaining agreement.[4] (*Misco, supra*, 484 U.S. at pp. 38-39.) In doing so, and thereby reversing a Court of Appeals decision, the court explained:

"Nor was it open to the Court of Appeals to refuse to enforce the award because the arbitrator, in deciding whether there was just cause to discharge, refused to consider

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[4] In *Misco*, the arbitrator was called upon to address an issue nearly identical to the one addressed by the arbitrator in this case: "whether the [employer] had 'just cause to discharge the Grievant under Rule II.1' and, '[i]f not, what if any should be the remedy.' " (*Misco, supra*, 484 U.S. at pp. 33-34.) There, following arbitration, the arbitrator found no just cause for termination and thus ordered the reinstatement of an employee who had been hired to operate hazardous machinery for the company, but had been terminated following his arrest at home for marijuana possession. (*Ibid.*) The arbitrator decided the evidence was insufficient to prove the employee had possessed or used marijuana on company property after refusing to consider evidence – unavailable to the company when it terminated the employee – that police had found the employee on company property leaving the backseat of a car that smelled of marijuana smoke and had a burning marijuana cigarette in the front seat ashtray. (*Ibid*.) After the company filed suit, the District Court vacated the award on the ground that it was contrary to public policy because it violated "general safety concerns that arise from the operation of dangerous machinery while under the influence of drugs" and criminal drug possession laws. The Court of Appeals affirmed. (*Id*. at p. 35.)

evidence unknown to the Company at the time Cooper was fired. The parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose." (*Misco, supra,* 484 U.S. at pp. 39-40.)

California arbitration law, we conclude, is consistent with *Misco*. Given the limited scope of judicial review described above, parties to private arbitration agreements in California are likewise bound in all but the rarest of cases by the arbitrator's determination of the procedural rules that govern resolution of the dispute and the arbitrator's choice of remedy, so long as his or her determination is consistent with the terms of the governing contract. (See *Advanced Micro Devices, supra,* 9 Cal.4th at p. 375 ["Unless the parties 'have conferred upon the arbiter the unusual power of determining his own jurisdiction' [citation], the courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers, whether for an unauthorized remedy or decision on an unsubmitted issue"]; *id*. at p. 383; *Moncharsh, supra,* 3 Cal.4th at p. 8.)

Applying these principles to the matter at hand, we accordingly must defer to the arbitrator's interpretation of the procedural rules that govern resolution of this dispute, including evidentiary rules, if his interpretation was rationally derived from the parties' agreement. (*Misco, supra*, 484 U.S. at pp. 38-40; *Advanced Micro Devices, supra,* 9 Cal.4th at p. 383; *Moncharsh, supra,* 3 Cal.4th at p. 8; see also *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 982.) The trial court concluded the arbitrator acted in excess of his authority in considering post-termination evidence, reasoning that the "MOU does not allow post-termination events (the hearing and Judge Laettner's Order of January 23, 2007) to be considered in determining whether the City had just cause for termination."[5] We thus turn to the MOU, as well as to the issue submitted to the arbitrator, both of which governed the arbitration proceedings in this case.

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[5] Specifically, the trial court concluded the arbitrator exceeded his authority in making the following finding: "The City's argument that the Grievant is not qualified today was not supported by the evidence record. When the misdemeanor charges were dismissed by the Superior Court, the judge expressly revoked and lifted the prior ban on the Grievant possessing weapons. . . . Therefore, the conclusion of the Arbitrator is that the Grievant is qualified to serve as a Richmond Police Officer."

The MOU permitted RPOA, on behalf of the Department's police officers, to utilize binding arbitration to resolve grievances and choose remedies related to disciplinary terminations. (MOU, section 30.4.) Yet, as RPOA points out, the MOU set forth few procedural rules to govern that arbitration process. Specifically, the MOU provided only that:

"The arbitrator shall have access to all written statements and documents relevant to the discipline. The arbitrator's decision shall be final and binding upon the parties. The arbitrator shall render a decision no later than thirty (30) days after the conclusion of the final hearing. Such decision shall be in writing and made in accordance with, and conformance to, the terms of this Memorandum of Understanding. Copies of the decision will be furnished to both parties." (MOU, section 30.4, subd. (c).)

Having considered this language, we agree with the trial court that the arbitrator lacked authority to consider post-termination evidence in this case. First, we note that, based upon the parties' stipulation, the issue submitted for the arbitrator's consideration was "Did the City have just cause to terminate the Grievant, Lawrence Darden? If not, what shall be the remedy?" As the City points out, the use of the past tense in the submission indicates that the arbitrator was limited to consideration of facts existing at the time the City made its decision to terminate Darden in determining whether just cause existed. (*Moncharsh, supra*, 3 Cal.4th at p. 8 [" ' "[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission" ' "]; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 547 [similar].)

Moreover, the MOU gave the arbitrator "access to all written statements and documents relevant to the discipline." (MOU, section 30.4, subd. (c).) A court order lifting the firearm ban imposed on Darden issued seven months *after* the City terminated him is not "relevant to the discipline" where the issue before the arbitrator was whether just cause existed at the time of the discipline. As such, having no right of access to evidence post-dating Darden's termination, the arbitrator should not have considered such evidence in deciding whether just cause for Darden's termination existed.

Although no other California court has thus far addressed this issue, several federal courts have done so and reached conclusions similar to ours. In *Gulf Coast Indus. Workers Union v. Exxon Co.,* (5th Cir. 1993) 991 F.2d 244, 256, for example, the arbitrator was asked to consider the nearly identical issue of whether the employee was "discharged for just cause and, if not, what is the appropriate remedy?" In deciding whether, based upon that submission and upon the parties' collective bargaining agreement, the arbitrator was authorized to consider the employee's post-termination conduct, the 5th Circuit concluded as follows: "The first part of the question is worded in the past tense. It is equivalent to asking, 'Did Exxon possess just cause on June 15, 1990 to terminate [the employee]?' Upon a careful review of the applicable legal principles and the terms of the parties' collective bargaining agreement, which strips the arbitrator of authority 'to alter or add to it in any way,' we hold that the arbitrator should have confined his considerations only to the facts as they existed at the time Exxon made its termination decision." (*Ibid*.) Putting aside the 5th Circuit's reference to the provision restricting the arbitrator's authority to alter or add to the agreement, which is not relevant in our case, we agree with the 5th Circuit's analysis regarding post-termination conduct and find it wholly consistent with our analysis discussed above. (See also *Ass'n of W. Pulp & Paper, Loc. 78 v. Rexam Graphic* (9th Cir. 2000) 221 F.3d 1085, 1089-1090 [concluding that post-termination conduct should not be used to decide whether an employer had just cause for termination, although it could be used in deciding an appropriate remedy]; *Delta Air Lines v. Air Line Pilots Ass'n, Inter.* (11th Cir. 1988) 861 F.2d 665, 669.)

We acknowledge the California Supreme Court's statements in *Advanced Micro Devices* that arbitrators, unless specifically restricted by the relevant agreement, " " 'may base their decision upon broad principles of justice and equity,' " " and that arbitrators' authority includes the power "to fashion relief they consider just and fair under the circumstances existing at the time of arbitration, so long as the remedy may be rationally derived from the contract and the breach." (*Advanced Micro Devices, supra,* 9 Cal.4th at pp. 374-375, 383.) However, unlike the California Supreme Court in *Advanced Micro*

Devices, we are not concerned here with an arbitrator's choice of remedy *after* the arbitrator decided that a remedy was in fact justified under the circumstances at hand. Rather, we are concerned with the arbitrator's decision regarding whether just cause existed in the first place to terminate Darden – a decision that, only if answered in the negative, would require a subsequent decision regarding choice of remedy. Moreover, as we have just explained, the arbitrator's decision in this case was specifically restricted by the parties' submission and MOU to whether just cause existed *at the time the termination decision was made*. As such, the California Supreme Court's discussion in *Advanced Micro Devices*, referred to above, is inapposite.

Accordingly, we affirm the trial court's decision to vacate the arbitrator's decision and award based upon the arbitrator's unauthorized consideration of the January 2007 criminal order, evidence that post-dated Darden's termination. Further, because we affirm on this ground, we need not address the parties' remaining arguments, now moot, regarding whether the arbitrator's award conflicted with public policy requiring obedience to valid court orders and whether the January 2007 criminal order superseded and took precedence over the March 2006 civil order.[6]

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[6] In its reply brief, RPOA argued that, even if the arbitrator was not authorized to consider post-termination evidence, his award should nonetheless be upheld based upon his separate reliance upon pre-termination evidence. In so arguing, RPOA directs us to the arbitrator's finding that "[g]iven the Grievant's 20 years of service with the department, the City's action was arbitrary and unreasonable. He was deserving of more consideration. . . . [¶¶] It was reasonable to assume that the City knew [Darden] would be appealing the order banning him from possessing a weapon. The City could have suspended him pending the outcome of his appeal. The City could have assigned him to a job in the department that involved no contact with the public until the matter was resolved. Other options were available. . . ."

RPOA failed to raise this alternative argument before the trial court or in its opening brief on appeal. Further, RPOA only briefly addressed the argument in its reply brief, mentioning it again at oral argument. Under these circumstances, we decline to consider RPOA's alternative argument here. " 'A contention made for the first time in an appellant's reply brief, unaccompanied by any reason for omission from the opening brief, may be disregarded. . . .' (*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 609 [94 Cal.Rptr. 200], citation omitted.)" (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830. See also

DISPOSITION

The trial court's decision to vacate the arbitration award is affirmed. Costs are awarded to the City of Richmond.

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Jenkins, J.

I concur:

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McGuiness, P. J.

Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 894-895, fn. 10.)

SIGGINS, J., Concurring.—The MOU states that employee grievances are subject to binding arbitration. "A grievance . . . for the purpose of binding arbitration [is] a disciplinary termination of employment or a disciplinary suspension without pay for 80 hours or more." In *Paperworkers v. Misco, Inc.* (1987) 484 U.S. 29, 39-40 and footnote 8, the United States Supreme Court observed it was the customary practice of arbitrators "to look only at the evidence before the employer at the time of discharge." Today we hold that the provisions in the MOU that provide an arbitrator "access to all written statements and documents relevant to the discipline," combined with a stipulation that permits an arbitrator to determine whether there was just cause to terminate an employee, confer jurisdiction upon the arbitrator to consider events leading to the employee's discharge or termination but not beyond it.

When an arbitrator is called upon to assess the propriety of an employer's decision to discharge an employee, the reason for this restriction seems obvious. Events that occur after discharge are not within the scope of the employment relationship as they take place after the "disciplinary termination of employment." In such circumstances it seems unfair to judge the employer's action in light of antecedent and possibly unforeseeable variables. The parties may, of course, confer upon an arbitrator the power to consider evidence of events that occur after an employee has been discharged. But if they do, their agreement should so provide in clear and unmistakable language. Here, as the court's opinion states, the parties did not clearly vest the arbitrator with the power to consider evidence of postdischarge events. It would be improper for us to expand the jurisdiction of the arbitrator by inference or implication.

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Siggins, J.